EG Tan & Co (Pte) (in liquidation) v Tan Chong San

HIGH COURT (KUALA LUMPUR) — CIVIL ACTION NO D4–23–1116–87
ABDUL MALEK J
7 JANUARY 1993

Civil Procedure *— Pleadings — Statement of claim — Claim arose in foreign jurisdiction — Whether statement of claim must be clear as to the grounds for enforcement of claim in Malaysian courts — Courts of Judicature Act 1964 s 23(1)*

Civil Procedure *— Appearance — Unconditional appearance — Whether leave may be given to withdraw unconditional appearance and to file conditional appearance*

Civil Procedure *— Proceedings — Irregularity — Whether proceedings may be set aside — Reasonable time for application to be made — Rules of the High Court 1980 O 2 r 2(1)*

The plaintiffs are a private company incorporated in Singapore and are share brokers. They had been ordered to be wound up by the Singapore High Court on 1 August 1986. This action had been brought at the instance of three joint and several liquidators of the plaintiffs against the defendant for the recovery of amounts due and owing on contra losses including interest accrued. The main suit had been set down for trial on 10 September 1992, but on 2 September 1992, the defendant filed a summons-in-chambers asking that:

(1) the defendant be given leave to withdraw his unconditional appearance and file a conditional appearance;
(2) the proceedings be set aside or stayed on the ground that the High Court of Malaya at Kuala Lumpur is not the proper or convenient forum to determine the issues, alternatively that the specially indorsed writ of summons and service be set aside or stayed for being in non-compliance with s 23 of the Courts of Judicature Act 1964 ('the Act'); and
(3) the writ of summons be set side or stayed for being in non-compliance with the Rules of the High Court 1980 ('the Rules') and for being frivolous, vexatious and an abuse of the process of court.

Held, dismissing the application:

(1) If conditional appearance had been entered after competent legal advice and not by mistake, the defendant should not be allowed to resile from the election so made. Here, unconditional appearance had been entered on 26 June 1987 after the defendant had retained his present solicitors and mistake had not been averted to in his affidavits. Moreover, within the last five years, the defendant had already taken steps in several interlocutory applications before making this application.
(2) In all personal action, the courts of the country in which the defendant resides, and not the courts of the country where the cause of action arose, should be resorted to.

(3) A writ need not be indorsed with a statement of claim, in which case it must be indorsed with a concise statement of the nature of the claim made or the relief or remedies required or with a statement of the amount claimed in respect of the debt or demand and for costs. It follows that either way, the provisions of s 23 of the Act need not be restated therein. Since the address for service pleaded in the statement of claim is actually the defendant's residential address as averted to in his affidavits, it is not even necessary to correct the pleadings and this irregularity cannot be a sufficient ground to set aside or stay the proceedings on the question of convenient forum.

(4) In the light of the wording in O 2 r 2(1) of the Rules and decided authorities, any application to set aside any proceedings for irregularity or for being frivolous, vexatious and an abuse of the process of court, has to be made within a reasonable time and five years, in this case, was not a reasonable time.

Per curiam:
The effect of entering an unconditional appearance is two fold, that is, it waives any irregularity of the writ or its service and that the defendant is considered to have submitted to the jurisdiction of the court. A defendant who wishes to set aside the writ or its service for non-compliance of the rules of procedure or who wishes to challenge the jurisdiction of the court must therefore enter a conditional appearance.

[Bahasa Malaysia summary

Plaintif adalah sebuah syarikat swasta yang telah diperbadankan di Singapura dan mereka adalah broker saham. Mereka telah diperintahkan supaya digulung oleh Mahkamah Tinggi Singapura pada 1 Ogos 1986. Tindakan ini telah dibawa atas kehendak tiga penyelesai pihak plaintif bersesama dan berasingan, terhadap pihak defendan untuk mendapat kembali jumlah wang yang kena dibayar dan hutang atas kerugian kontra termasuk faedah terakru. Guaman utama telah ditetapkan untuk perbicaraan pada 10 September 1992, tetapi pada 2 September 1992, defendan telah memfailkan suatu saman dalam kamar meminta supaya:

(1) defendan dibenarkan untuk menarik balik kehadiran tanpa syarat dan memfailkan suatu kehadiran bersyarat;

(2) prosiding diketepikan atau digantung atas alasan bahawa Mahkamah Tinggi Malaya di Kuala Lumpur bukan merupakan forum yang betul atau sesuai untuk penentuan isu atau sebagai alternatif bahawa writ saman dan penyampaian yang berendorsan khas diketepikan atau digantung kerana tidak mematuhi s 23 Akta Mahkamah Kehakiman 1964 ('Akta itu'); dan

(3) writ saman itu diketepikan atau digantung kerana tidak mematuhi Kaedah-Kaedah Mahkamah Tinggi 1980 ('Kaedah itu') dan kerana remeh, menyusahkan dan merupakan suatu penyalahgunaan proses mahkamah.

Diputuskan, menolak permohonan itu:

(1) Jika kehadiran bersyarat dibuat selepas nasihat undang-undang kompeten dan bukan kerana kesilapan, defendan tidak patut dibenarkan untuk menukar fikiran mengenai pilihan itu. Di sini, kehadiran tanpa syarat telah dibuat pada 26 Jun 1987 selepas defendan telah mengekalkan peguambela mereka masakini dan kesilapan tidak ditegaskan di dalam afidavit beliau. Tambahan pula, di dalam lima tahun yang lalu, defendan telah mengambil langkah dalam beberapa permohonan interlokutori sebelum permohonan ini dibuat.

(2) Di dalam kesemua tindakan diri, mahkamah negara kediaman defendan, dan bukan mahkamah negara di mana kausa tindakan timbul, yang patut digunakan.

(3) Suatu writ tidak perlu diendorskan dengan pernyataan tuntutan, oleh itu ia mesti diendors dengan suatu pernyataan yang ringkas lagi padat tentang sifat tuntutan yang dibuat atau relif atau remedi yang diperlukan atau dengan suatu pernyataan tentang amaun yang dituntut berkaitan dengan hutang atau tuntutan dan untuk kos. Macam mana sekalipun, peruntukan s 23 Akta itu tidak perlu dinyatakan semula di dalamnya. Memandangkan bahawa alamat untuk penyampaian yang dikemukakan di dalam penyampaian tuntutan adalah sebenarnya alamat tempat tinggal defendan sepertimana yang ditegaskan dalam afidavitnya, adalah tidak perlu untuk membetulkan pliding itu dan luar aturan ini tidak cukup untuk mengenepikan atau menggantung prosiding atau soalan kemudahan forum.

(4) Berdasarkan perkataan A 2 k 2(1) Kaedah itu dan autoriti yang diputuskan, sebarang permohonan untuk mengenepikan sebarang prosiding atas sebab luar aturan atau kerana remeh, menyusahkan dan merupakan suatu penyalahgunaan proses mahkamah, mesti dibuat dalam masa yang munasabah dan lima tahun, dalam kes ini, tidak merupakan masa yang munasabah.]

Per curiam:

Akibat memasukkan kehadiran tidak bersyarat adalah dua, iaitu, ia mengenepikan sebarang luar aturan writ itu atau penyampainnya dan defendan dinampakkan sebagai telah menunduk kepada bidang kuasa mahkamah. Seorang defendan yang ingin mengenepikan writ itu atau penyampaiannya kerana tidak menurut kaedah prosidur atau kerana ingin mencabar bidang kuasa mahkamah mestilah memasukkan kehadiran bersyarat.]

Notes

For cases relating to conditional and unconditional appearances, see 2 *Mallal's Digest* (4th Ed) paras 480–483 and 490–492.

Cases referred to

1 *Somportex Ltd v Philadelphia Chewing Gum Corp* [1968] 3 All ER 26 (folld)

2 *Firth v John Mowlem & Co Ltd & Anor* [1978] 3 All ER 331 (refd)

A 3 *Sirdar Gurdyal Singh v The Rajah of Faridkote* [1894] AC 670 (folld)
4 *Sheldon v Brown Bayley's Steelworks Ltd & Anor* [1953] 2 All ER 894 (refd)
5 *KMNSPN Valliammai Achi v ARS Nachiappa Chettiar* [1957] MLJ 27 (distd)
B 6 *The 'Avro International'; The 'Avro Venture'; 'Avro International' (Owners of) v Arabian Marine Bunkers Sales Co Ltd & Anor* [1988] 1 MLJ 147 (folld)

Legislation referred to
C Courts of Judicature Act 1964 s 23(1)

Chandran G Nair (*Thevin, Chandran & Wong*) for the defendant/applicant.
LH Ng (*Skrine & Co*) for the plaintiff/respondent.

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Abdul Malek J: The plaintiffs are a private company incorporated in the Republic of Singapore and are share brokers and members of the Stock Exchange Singapore Ltd. They had been ordered to be wound up by the Singapore High Court on 1 August 1986. This action had been brought at
E the instance of the three joint and several liquidators of the plaintiffs appointed by the Singapore High Court on the same day as the winding-up. The defendant's address of service is at 93 Jalan Kampong Simee, Ipoh, Perak.

It had been pleaded in the statement of claim, filed on 3 February 1987 that at the request and upon the instructions of the defendant, the plaintiffs
F had made sales and purchases of shares on behalf of the defendant and based on the amounts due and owing on contra losses including interest accrued as at 30 November 1986 at the agreed rate, the full particulars of which had been rendered to the defendant, the defendant was indebted to the plaintiffs in the sum of S$907,159.42 with interest on the sum stated at
G the rate of 16.425%pa from 1 December 1986 to the date of final payment. A written demand for the said sums had been made on 17 December 1986 but had met with no response.

In his statement of defence filed on 7 July 1987, the defendant admitted that there were certain transactions for the purchase and sale of shares in public companies between him and the plaintiffs but had denied all the
H other particulars in the statement of claim. He had further pleaded that the plaintiffs had acted unlawfully and in breach of the rules and terms governing the customer-broker relationship as a consequence of which the plaintiffs' claim was unenforceable.

By summons-in-chambers filed on 26 October 1987, the plaintiffs ap-
I plied for an order that judgment be entered for the plaintiffs against the defendant for the amounts prayed or alternatively, that the defence of the defendant be struck out but this was dismissed with costs by the learned senior assistant registrar on 9 February 1990. The appeal against this decision was withdrawn by the plaintiffs on 18 July 1990 and consequently, had been dismissed with costs.

On 9 March 1992, the defendant had applied by summons-in-chambers for an order that he be given leave to amend his statement of defence and that the plaintiff, as a foreign company, be ordered to pay security for costs. When the matter was called on 16 April 1992 before the learned senior assistant registrar, the parties had intimated that they were in the process of settling the application and on 5 May 1992, the plaintiffs had consented to the amendments and to pay RM10,000 to the defendant as security for costs. For the amendments, the learned senior assistant registrar had also ordered costs against the defendant.

The main suit had been set down for trial on 10 September 1992, but on 2 September 1992, the defendant filed a summons-in-chambers asking, firstly, that the defendant be given leave to withdraw his unconditional appearance and file a conditional appearance; secondly, that the proceedings be set aside or stayed on the ground that the High Court of Malaya at Kuala Lumpur is not the proper or convenient forum to determine the issues, alternatively that the specially indorsed writ of summons and service thereof be set aside or stayed for being in non-compliance with s 23 of the Courts of Judicature Act 1964 (hereinafter 'the Act'); and thirdly, that the writ of summons be set aside or stayed for being in non-compliance with the Rules of the High Court 1980 (hereinafter 'the Rules') and for being frivolous, vexatious and an abuse of the process of court.

Consequently, the hearing date had to be vacated and the application was fixed for hearing on 14 September 1992. On that date, learned counsel for the plaintiffs had asked for an adjournment to file the affidavit in reply and when the matter was finally heard on 9 October 1992, I had dismissed the application with costs.

Learned counsel for the defendant's main ground for the application was that the statement of claim did not show that the plaintiff's case fell within the ambit of s 23(1) of the Act which is reproduced here for ease of reference:

> Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where —
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> (a) the cause of action arose, or
> (b) the defendant or one of several defendants resides or has his place of business, or
> (c) the facts on which the proceedings are based exist or are alleged to have occurred, or
> (d) any land the ownership of which is disputed is situated,
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> within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

He was of the opinion that as this case involved a cause of action that arose in a foreign jurisdiction, the plaintiffs must make it clear in their statement of claim, the grounds which would enable them to enforce their claim in the Malaysian courts. In his view, as the statement of claim only stated that 'the defendant has an address of service at 93 Jalan Kampong Simee, Ipoh, Perak', this did not fulfil the requirements of the referred section, in particular para (b) of sub-s (1), as service is in no sense a foundation of

jurisdiction of the High Court in this country. It was his contention that the pleadings must state that the defendant was a resident or has a place of business in West Malaysia before the High Court in Malaya can be vested with the jurisdiction in the matter.

Learned counsel had further went on to argue that the fact that the defendant had entered unconditional appearance does not preclude him from withdrawing it and that it did not in any way operate as an estoppel as jurisdiction did not originate through the consent of parties and cannot be so established, where it is absent, by such consent. He added that the statement of claim could not be amended at this stage to rectify any defect as it was a nullity ab initio and there would be nothing to amend. Further, any amendment would prejudice the defendant's defence of limitation. His final submission was that in cases involving a breach of contract as in this case, jurisdiction is determined by identifying the place where the breach took place which he said was in Singapore which was also where the plaintiffs lived.

It is appropriate to consider the prayers in the defendant's application separately although there is some amount of overlap in the second and third prayers. The first prayer is for leave to withdraw his unconditional appearance and to file a conditional appearance. Although this is specially provided for in O 21 r 1 of the Rules, I was persuaded by the ruling in *Somportex Ltd v Philadelphia Chewing Gum Corp*[1] to disallow this prayer. There, the Court of Appeal in England had held that the conditional appearance had been entered after competent legal advice and not by mistake and the defendants, an American company, should not be allowed to resile from the election so made as the plaintiffs had continued the English action on the basis of appearance. Accordingly, leave to withdraw appearance was refused and the conditional appearance stood as unconditional subject to any appeal from the order dismissing the application to set aside the writ. They were also of the view that if an appearance was entered by mistake or without authority, leave to withdraw the appearance may be given. In our case, the facts are stronger as unconditional appearance, as opposed to conditional appearance, had been entered on 26 June 1987 after the defendant had retained his present solicitors and mistake had not been averred to in his affidavits. I could therefore find no reason in the circumstances to allow for it to be withdrawn more than five years later. As decided in *Firth v John Mowlem & Co Ltd & Anor*,[2] the relevant rule gave the court a complete discretion to give leave to withdraw an appearance, the exercise of which depended on the facts of each case and on the facts of this case, I was more than convinced that this decision was correct, especially so when in the last five years, the defendant had already taken steps in several other interlocutary applications before making this application.

As for the second and third prayers, it is trite law under O 6 of the Rules that a writ need not be indorsed with a statement of claim, in which case it must be indorsed with a concise statement of the nature of the claim made or the relief or remedies required or with a statement of the amount claimed in respect of the debt or demand and for costs. It follows that either way, the provisions of s 23 of the Act need not be restated therein. Learned counsel for the defendant had in fact admitted in his submissions that

generally, it is actually not necessary to plead the defendant's residence in this country. Apart from the fact that the defendant had already entered an unconditional appearance and had therefore submitted to the jurisdiction of this court, he had in fact filed not less than eight affidavits giving his residential address which was the same as the address for service stated in the statement of claim. In *Sirdar Gurdyal Singh v The Rajah of Faridkote*,[3] the House of Lords had held that in all personal actions, the courts of the country in which the defendant resides, not the courts of the country where the cause of action arose, should be resorted to. The *Supreme Court Practice* (1979) Vol I Pt 1 at p 34 states that the description or occupation of the defendant need not be stated in the writ but his address must be given with as much exactitude as possible and that a wrong address or a misdescription as to his business, when the defendant is not misled or prejudiced, is not an irregularity sufficient to warrant the setting aside of the writ and service. It is therefore my finding that since the address for service pleaded in the statement of claim is actually the defendant's residential address as averred to in his affidavits, it is not even necessary to correct the pleadings and this irregularity cannot be a sufficient ground to set aside or stay the proceedings on the question of convenient forum.

Mallal's Supreme Court Practice (2nd Ed) Vol I at p 68 had pointed out that the effect of an unconditional appearance is a waiver of any irregularity there may be and a submission to the jurisdiction of the court as per *Sheldon v Brown Bayley's Steelworks Ltd & Anor*[4] but it is not a waiver where the service is a nullity as per *KMNSPN Valliammai Achi v ARS Nachiappa Chettiar*[5] which is of course not applicable in this case. In *The 'Avro International'; The 'Avro Venture'; 'Avro International' (Owners of) v Arabian Marine Bunkers Sales Co Ltd & Anor*,[6] the Court of Appeal in Singapore decided that the effect of entering an unconditional appearance is twofold, that is, it waives any irregularity of the writ or its service and that the defendant is considered to have submitted to the jurisdiction of the court. They further held that a defendant who wishes to set aside the writ or its service for non-compliance of the rules of procedure or who wishes to challenge the jurisdiction of the court must therefore enter a conditional appearance and that in their case, the appellants' unconditional appearances were fatal to their right to object to jurisdiction. To my mind, the same ruling would apply in this case.

It was also my finding that, in the light of the wording in O 2 r 2(1) of the Rules and decided authorities, any application to set aside any proceedings for irregularity under that rule, or for being frivolous, vexatious and an abuse of the process of court under O 18 r 19 of the Rules, has to be made within a reasonable time and my view was that five years in this case, especially so when the hearing date had already been fixed and several other applications had been made before that, was certainly not a reasonable time. On this ground alone, the third prayer must also fail.

All factors considered, I could only come to the conclusion that the defendant's application ought to be dismissed with costs which I so ordered.

Application dismissed.

Reported by Jeanne Tan